FILE COPY

FIL
SEP 8
CHARLES ELMORE

No. 289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

WALTER W. TAYLOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

TRUMAN HENSON,
Attorney for Respondent,
Office and P. O. Address,
26 Liberty Street,
New York, N. Y.

INDEX.

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statutes and Regulations Involved 2, 19, 20

Statement 3

Argument 7-18

I. The questions presented in this cause are unique and not of general importance 7

II. The decision below appears to be correct 9

III. There does not appear to be any conflict 15

Conclusion 18

Appendix 19, 20

Citations.

Cases:

Becker v. United States, 21 Fed. (2d) 1003 (C. C. A. 5) 16

Citrus Soap Company of California v. Lucas, 42 Fed. (2d) 372 (C. C. A. 9) 12

Cohan v. Commissioner, 39 Fed. (2d) 540 (C. C. A. 2) 11

Collin v. Commissioner, 32 Fed. (2d) 753 (C. C. A. 6) 4, 12

Conrad & Co., Inc. v. Commissioner, 50 Fed. (2d) 576 (C. C. A. 1) 11

Darcy, *et al.* v. Commissioner, 66 Fed. (2d) 581, 585 (C. C. A. 2), certiorari denied, 290 U. S. 705 16

Dempster Mill Mfg. Co. v. Burnet, 46 Fed. (2d) 604 (C. A., D. C.) 12

PAGE

Eau Claire Book & Stationery Co. v. Commissioner, 65 Fed. (2d) 125 (C. C. A. 7) 12
Ferguson v. Commissioner, 59 Fed. (2d) 893 (C. C. A. 10) 12
Independent Ice & Cold Storage Co. v. Commissioner, 50 Fed. (2d) 31 (C. C. A. 5) ..12, 16
Kendrick Coal & Dock Co. v. Commissioner, 29 Fed. (2d) 559 (C. C. A. 8) 12
Kirkland v. Burnet, 57 Fed. (2d) 608 (C. A., D. C.) 4, 12, 13
Matern v. Commissioner, 61 Fed. (2d) 663 (C. C. A. 9) 17
Nichols v. Commissioner, 44 Fed. (2d) 157 (C. C. A. 3) 12
Old Mission Portland Cement Co. v. Commissioner, 69 Fed. (2d) 676, 679 (C. C. A. 9) 17
Pittsburgh Hotels Co. v. Commissioner, 43 Fed. (2d) 345 (C. C. A. 3) 11
Rhode Island Hospital Trust Co. v. Commissioner, 29 Fed. (2d) 339 (C. C. A. 1) 11
Strother v. Commissioner, 55 Fed. (2d) 626 (C. C. A. 4), affirmed 287 U. S. 308 12
Underwood v. Commissioner, 56 Fed. (2d) 67 (C. C. A. 4) 12

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9, 110: Sec. 1003 (U. S. C. A., Title 26, Sec. 1226) .. 19
Revenue Act of 1928, c. 852, 45 Stat. 791, 815, 818:
Sec. 111 .....19, 20
Sec. 113 20

Miscellaneous:

Regulations 74, Art. 58 ..... 4, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 289.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

WALTER W. TAYLOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 12) is unreported. The opinion of the Circuit Court of Appeals (R. 67) is reported in 70 F. (2d) 619.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 18, 1934 (R. 70). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether, under the peculiar circumstances of this case, the Circuit Court of Appeals erred in remanding the case for further proceedings, where the Board of Tax Appeals had decided the Commissioner's determination of the taxpayer's income to be correct, despite the fact that such determination had been established to be wrong: that is to say,

Whether, where the Commissioner made a determination that the taxpayer's income be increased, and the taxpayer appealed to the Board of Tax Appeals, and at the trial, relying upon an agreement of counsel that proof of one issue would establish that his income should not be increased, confined his proof to that issue, and the Board thereafter decided that, for lack of further evidence, it could not determine whether, or in what amount, the taxpayer had additional income, the Circuit Court of Appeals erred in remanding the case to the Board for further proceedings when, despite the fact that such determination of the Commissioner was wrong on its face, and in any event was proven to be wrong by the evidence which was introduced, the Board both failed to require further evidence on its own motion, and refused to receive further evidence duly offered by the taxpayer in a motion for new trial (although such evidence, if adduced, would have established that the taxpayer had no additional income) but on the contrary, without attempting any decision on the merits, decided that the taxpayer had the additional income determined by the Commissioner.

Statutes and Regulations Involved.

The Statutes and Regulations involved are set out in the Appendix, *infra*, pp. 19, 20.

Statement.

The Board of Tax Appeals made no separate findings of fact and only a memorandum opinion. A statement of the substance of all the evidence adduced, agreed to by counsel for the Commissioner and duly settled by the Board, appears in the Record (R. 48-64).

In August, 1927, the taxpayer purchased, at a total cost of $96,030., all the stocks of three small public utilities companies and all the assets of an unincorporated fourth public utility enterprise, and thereupon, and on September 1, 1927 (R. 51) (and not on October 13, 1927, as stated in the petition and the Board's memorandum opinion), incorporated the Allied Public Service Corporation for the purpose of taking over said four public utilities. He thereupon incorporated the unincorporated public utility enterprise and thereupon, and on October 13, 1927, transferred the stocks of all four public utility companies to said Allied Public Service Corporation in a non-taxable exchange,[1] and received in return all the stock of that corporation, to wit: 1,000 shares $6. no par cumulative preferred, entitled to a prior $100. per share on liquidation and callable at $105.; 2,500 shares Class A Common, callable at $35.; and 5,000 shares Class B Common (R. 50, 51, 52, 57, 58). At the trial herein the taxpayer, who was the only witness called, was qualified as an expert witness (R. 49, 50, 56, 59, 61) and testified that the value of the stock of the Allied Public Service Corporation was no greater than the aggregate of the stocks of said four public

1. With the result that the taxpayer's cost basis for all the stock of the Allied Public Service Corporation was the same as the cost to him of the four small public utility companies.

utility companies, for the same were separated by other companies and could not be operated more economically, nor at a greater profit, nor were the same more readily salable, under one ownership than under four (R. 56, 59, 60, 61, 62); that beginning in the late winter of 1927 and running to and beyond May, 1928, a large appreciation took place in the market price of public utility stocks and properties (R. 55, 56, 57, 59, 60); that after making numerous unsuccessful attempts to sell the stocks of said four small public utility companies, said Allied Public Service Corporation was approached by a holding company which had an unusual need for properties of this precise size and location, which fortuitous circumstance, together with said appreciation, made it possible in May, 1928, for said Allied Public Service Corporation to sell said stocks for $194,930.16; and such sale was accomplished (R. 52, 53, 54, 55, 59, 61). Thereafter, and during the year 1928, the taxpayer sold his preferred stock in said Allied Public Service Corporation for $99,000. (R. 52).

In his income tax return for 1928, the taxpayer reported, as profit on such sale, the difference between $99,000., the sale price of the preferred and $96,030., the cost of all the stock (R. 52).[2]

The Commissioner, thereafter, issued his deficiency notice to the taxpayer in which he finally determined

---

2. Applying the rule that where it is impracticable fairly to apportion, to the stock sold, a part of the cost of several classes of stock, acquired in a lump sum transaction, no profit is realized until, out of the proceeds, the total cost shall first have been realized; and that all the proceeds of the balance of the stock, when sold, constitutes income.

Regulations 74, Art. 58 (*infra*, p. 20).
Collin v. *Commissioner*, 32 F. (2d) 753.
Kirkland v. *Burnet*, 57 F. (2d) 608.

the taxpayer's cost basis for his said preferred stock to be $48,771.16, or that proportion of $96,030., the cost of all said stock, which was represented by a fraction, the denominator of which was $194,930.16, the price for which said Allied Public Service Corporation sold its said assets in May, 1928, and the numerator of which was $99,000., the sum for which the taxpayer thereafter sold his preferred stock (R. 52, 53). The taxpayer duly took his appeal, from said deficiency notice, to the Board of Tax Appeals (R. 4-10).

At the trial before the Board, counsel for the Commissioner and then counsel for the taxpayer orally agreed that if the value of all the assets of the Allied Public Service Corporation (consisting of said stocks of said four small public utility companies), at the time the same were acquired from the taxpayer, was not in excess of the cost of said assets to the taxpayer, or $96,030., then there was no deficiency. The Board Member conducting the trial inquired of counsel for the Commissioner if he concurred in this statement and counsel for the Commissioner stated that he concurred.

The said oral stipulation of counsel and question by the Board Member and answer by counsel for the Commissioner do not appear in the transcript of the proceedings at the trial, but that the same took place is established by the affidavit of William P. Jeffery (R. 35, 36) and one of the affidavits of Walter R. Bullock (R. 34) annexed to the motion for new trial and incorporated by reference in the Petition to the Circuit Court of Appeals praying for review of the decision of the Board.

Acting upon the faith of such agreement, the taxpayer introduced evidence only as to the value of said assets as of said date (R. 48-64).

Thereafter, the Board made its memorandum opinion (R. 12-18) and decision (R. 18) that however well the taxpayer had proven that the value of all the assets of the Allied Public Service Corporation, at the time the same were acquired by it, was only $96,030., still that was only one term, the denominator, of a correct fraction to apply, for purposes of apportionment, against the cost of all the stock; and that the taxpayer should have proven a proper numerator as well. The Board did not make any finding as to whether it was in fact practicable fairly to apportion the cost basis of all the stock, but decided that by introducing evidence only as to the value of said assets at said date, the taxpayer had failed to prove his case; and that the Commissioner's determination was entitled to a presumption of correctness and should be redetermined.

Thereafter, the taxpayer moved for a new trial (R. 19-37), contending that he should not be penalized for failing to introduce evidence as to other matters when he refrained from offering the same by reason of said oral stipulation of counsel; and further contending that in any event it is common knowledge, of which Courts have taken, and the Board should take, judicial notice that preferred and common stocks do not appreciate at the same rate and could not have done so in the circumstances here; that by virtue of that fact the Commissioner's said determination was wholly erroneous, arbitrary and fanciful on its face as a matter of law, for the same was based upon a 1928 ratio which was no evidence of the 1927 ratio but, rather, was conclusive evidence of what the 1927 ratio was not; that, therefore, the Commissioner's said determination was not entitled to any presumption of correctness and should not have been redetermined; and that the Board should grant a new trial at which to receive the evidence, de-

scribed in the supporting affidavits and offered for production, to show that no fair apportionment of said total cost was practicable as of the date of the acquisition of said stock by the taxpayer, and to enable the Board to decide the appeal on the merits.

The Board denied said motion from the bench (R. 2); and the taxpayer appealed to the Circuit Court of Appeals for the Second Circuit, which reversed and remanded (R. 67-70).

ARGUMENT.

I.

The questions presented in this cause are unique and not of general importance.

The questions presented in this case are not, it is submitted, capable of reduction to any such question of general import as contended in the petition. While a negative answer to the question propounded in the petition would, of course, result in affirmance here, a reversal would not necessarily follow from a decision that under normal circumstances a taxpayer before the Board of Tax Appeals has the burden of proving not only that the determination of the Commissioner is wrong but also what a correct determination should be.

The instant case is complicated by the stipulation of counsel that proof of one issue would establish the taxpayer's case. Where a case is tried upon such a state of facts, we submit that the taxpayer should, without more, be entitled to another opportunity to prove his case, when the Board decides, as here, after the close of the trial, that however well the fact in question was

proven, still sufficient facts upon which to base any decision have not been shown. The taxpayer, upon the Board's decision that all the necessary facts had not been proven, moved for a new trial offering additional evidence described in supporting affidavits. The additional evidence offered would have established that no allocation to the preferred of a part of the cost of all of the stock, was practicable; and hence that there was no deficiency. But the Board denied the motion and refused to accept the evidence. This action, in our view, injects a question, peculiar to this case, which might well be decisive.

Moreover, there can be no question of the taxpayer's burden of proof in this case, for the determination of the Commissioner from which the appeal to the Board was taken was wrong on its face and could have carried no presumption of correctness to raise any burden of proof on the taxpayer. The Commissioner's determination itself establishes its error. The taxpayer paid $96,030. for assets which he exchanged with all reasonable speed for all the common and preferred stock of a corporation which had no other assets. The preferred was no par, was callable at $105., and its total liquidation value was $100,000. Seven or eight months later the corporation sold the assets for $194,930.16 and the petitioner sold his preferred stock for $99,000., thus establishing $\frac{99,000}{194,930.16}$ as the ratio of the preferred to all the stock at the later date. But the Commissioner determined the ratio of the later date to be also the ratio of the earlier date, a determination, wrong on its face, for the common must have appreciated, during the interval, to a much greater extent than the preferred. The later ratio was not only no evidence of the earlier,

but was, on the contrary, conclusive evidence of the one ratio which could not have obtained at the earlier date.

The presumption of correctness of a determination by the Commissioner of Internal Revenue, which lays a burden of proof upon a taxpayer, is based upon a presumption of the exercise of sound discretion by the Commissioner, but where the Commissioner refuses or fails to exercise his discretion, or makes a determination which is no more than capricious or fanciful, no presumption of correctness can arise. It is a mere contradiction in terms to say that a determination, wrong upon its face, is presumptively correct. The rule as to burden of proof in a normal case, where the Commissioner's determination is entitled to a presumption of correctness, cannot be involved in this case which is fundamentally abnormal.

In view of the unique questions involved in this case, it is submitted that a review thereof would be limited to a consideration of the merits and would not require the decision of any question of general importance.

II.

The decision below appears to be correct.

The decision of the Circuit Court of Appeals in remanding this case for findings of fact upon which a decision on the merits could be made is not one which involves unfairness to the Government; the Court could well have decided from the record that there was no deficiency.

The record contains sufficient evidence to have served as a basis for a decision that no allocation was prac-

ticable. The taxpayer acquired all the stock of the Allied Public Service Corporation. The record discloses that he held the preferred throughout the period in question, and nothing appears to rebut the presumption that he continued to hold all the common. No sales or other evidence of respective values for the different classes of stock were suggested in the respondent's determination or otherwise. No dividends were distributed by the underlying companies at any time while they were under the control of the taxpayer (R. 62).[3] The record does not contain a statement of the financial histories of the four underlying companies, but the Commissioner had this information, for he had their income tax returns. The Commissioner had fully audited the taxpayer's return and examined his books and records. He had sent the taxpayer two audit letters proposing additional tax and had received the taxpayer's statements in protest. The Commissioner was in possession of all the facts and must be presumed to have made the best allocation that could be made. When that allocation proves to be wrong on its face, it must amount, it is submitted, to an admission that no allocation was practicable. In remanding the case for further proceedings the Circuit Court of Appeals did not deviate from the most scrupulous fairness to the Government.

Nor was the technical ground of the taxpayer having met his burden of proof, the only ground upon which the Circuit Court of Appeals might have remanded. That decision would have been amply justified upon the single ground that the petitioner was entitled to an opportunity to present his further evidence, inasmuch as it was withheld at the trial in reliance upon the

---

3. Although in its memorandum opinion the Board stated that there was no testimony of this fact (R. 17).

stipulation of counsel that only one fact need be proved; or upon the single ground that the evidence described and offered in the motion for new trial would have established no deficiency to be due, and that justice is not to be defeated by a mistake or misfortune at the trial.

But aside from all the above and considering the matter only from the point of view of the question stated in the petition to be raised by the case, the Circuit Court of Appeals could hardly have failed to reverse and remand.

The rule is uniform and well settled that where, in a proceeding before the Board of Tax Appeals, the determination of the Commissioner has, as here, been established to be wrong, but, evidence sufficient to form a basis for a decision on the merits not having been introduced, the Board has redetermined the erroneous determination of the Commissioner, the decision of the Board will be reversed and the case sent back for further facts. The Circuit Courts of Appeals for every circuit and the Court of Appeals of the District of Columbia have so held.[4]

Rhode Island Hospital Trust Co. v. *Commissioner* (C. C. A. 1) 29 F. (2d) 339;

Conrad & Co., Inc. v. *Commissioner* (C. C. A. 1) 50 F. (2d) 576;

Cohan v. *Commissioner* (C. C. A. 2) 39 F. (2d) 540;

Pittsburgh Hotels Co. v. *Commissioner* (C. C. A. 3) 43 F. (2d) 345;

---

4. Except that in the Third Circuit the Court has gone farther and laid down the rule that where the Commissioner's determination is shown to be wrong, the Commissioner must show why the return should not be approved.

Nichols v. *Commissioner* (C. C. A. 3) 44 F. (2d) 157;
Strother v. *Commissioner* (C. C. A. 4) 55 F. (2d) 626, aff'd. 287 U. S. 308;
Underwood v. *Commissioner* (C. C. A. 4) 56 F. (2d) 67;
Independent Ice & Cold Storage Co. v. *Commissioner* (C. C. A. 5) 50 F. (2d) 31;
Collin v. *Commissioner* (C. C. A. 6) 32 F. (2d) 753;
Eau Claire Book & Stationery Co. v. *Commissioner* (C. C. A. 7) 65 F. (2d) 125;
Kendrick Coal & Dock Co. v. *Commissioner* (C. C. A. 8) 29 F. (2d) 559;
Citrus Soap Co. of California v. *Lucas* (C. C. A. 9) 42 F. (2d) 372;
Ferguson v. *Commissioner* (C. C. A. 10) 59 F. (2d) 893;
Kirkland v. *Burnet* (C. A., D. C.) 57 F. (2d) 608;
Dempster Mill Mfg. Co. v. *Burnet* (C. A., D. C.) 46 F. (2d) 604.

It is difficult to see how the rule could be otherwise.

In the instant case, if, for purposes of the point, we concede that there was nothing in the record upon which a decision of no deficiency could have been based, the Board, after the trial, and without the further evidence offered, could not have known whether or not the taxpayer had any additional income, or, if so, in what amount. There was only one fact of which the Board could have been certain, and that was the fact that the taxpayer did not have the additional income which the Commissioner had determined. To ask for a reversal of the decision of the Circuit Court of Appeals

in this case, the Commissioner must contend that the Board should be upheld in deciding that the taxpayer did receive the one item of income which it knew he did not receive. A contention that any determination of the Commissioner, even though it be that two plus two equals five, is nevertheless entitled to a presumption of correctness, seems equally impossible of support. Yet these are the positions which must, it is submitted, be taken and sustained by the Commissioner in order to ask for a reversal here.

That the determination of the Commissioner in this case was wrong on its face seems too clear for serious contradiction. Assets were purchased in August by the taxpayer for $96,030. He transferred them on October 13 to a corporation, which had no other assets, for all its stock, common and preferred. In May of the following year the assets were sold for $194,930.16. At that time the ratio of the preferred to all the stock was $\frac{99,000}{194,930.16}$. The Commissioner determined the same ratio to have obtained at the date of the transfer to the corporation by the taxpayer. On its face the determination was wrong, for at least part of the appreciation must have taken place during the interim, and common and preferred stocks do not appreciate at the same rate.[5]

When, however, the proof made at the trial is taken into consideration, the error of the Commissioner's determination is made even more certain.

No contention made on behalf of the Commissioner goes so far as to allege that the determination made by him in this case was correct, but the petition does contend that it was not necessarily wrong. It is submitted,

---

5. The Court of Appeals of the District of Columbia took judicial notice of this fact in *Kirkland* v. *Burnet, supra.*

however, that the point made in the petition in this respect is based upon erroneous premises.

In this regard the petition urges that at least a part of the appreciation had taken place between the purchase of the four original properties and the transfer to the holding company. The taxpayer bought the original properties in August, 1927 (R. 50) and thereupon and on September 1, 1927 (R. 51) formed the holding company. One of the original companies, which was unincorporated, was then incorporated; and the stocks of the four were transferred to the holding company, and its stock issued to the taxpayer, on October 13, 1927. It is submitted that, in the circumstances, this acquisition should relate back, for the taxpayer bought the original properties for the purpose of transferring them to the holding company. But in any event, the petition is in error in assuming any appreciation to have taken place prior to, or upon, the acquisition by the holding company. Quite the contrary, the uncontradicted testimony of the taxpayer, who was the only witness, and who was qualified as an expert was, as above set out in the statement of the case, that the stock of the holding company was of no greater value than the aggregate value of the stocks of the four original properties. The original properties were not contiguous (except for the two which cost $9,500. and $4,500., respectively) and none of the economies of operation or other advantages of combination referred to in the petition occurred (R. 56, 59, 60, 61, 62). The appreciation took place in the winter of 1927 and the spring of 1928 (R. 55, 56, 57, 59, 60), and the price at which the properties eventually sold was due to such appreciation and to fortuitous circumstance (R. 52, 53, 54, 55, 59, 61).

While, as aforesaid, the entire appreciation took place between October 13, 1927 and May, 1928, that fact is not essential to show the absolute error of the Commis-

sioner's determination. So long as any substantial part of the appreciation took place between those dates, and this the petition does not attempt to deny, the later ratio must have been different from the earlier. The total assets of the corporation being substantially equal to (or even if they had been in excess of) the liquidation value of the preferred at the earlier date, it seems impossible to contend that the appreciation in the assets did not effect a greater increase in the value of the common than in the value of the preferred.

The determination of the Commissioner was wrong on its face, and in any event was proven to be wrong. If, in spite of the self-demonstrated error of the Commissioner's determination, it was entitled to any presumption, the taxpayer had rebutted it. The decision of the Board was that the taxpayer had received income which, it had been established, he had not received. By reversing that decision, and remanding the case, the Circuit Court of Appeals did not impose any duty upon the Commissioner to prove a new proposed assessment, nor did it even impose upon the Board, as a fact finding body, the duty of requiring further evidence. The evidence of the facts necessary to make a decision on the merits is available and has been offered by the taxpayer and refused by the Board. That evidence would establish that the additional tax which has been assessed against and collected from the taxpayer was not due.

The decision of the Court below appears to be right.

III.

There does not appear to be any conflict.

The principal ground upon which the petition asks that certiorari issue is an asserted conflict between the decision in this case and the decisions of certain of the

Circuit Courts of Appeals cited in the petition. But the contention that the cases cited in the petition establish a rule that the burden is on the taxpayer to show the correct amount of the tax in order to have the Commissioner's determination set aside, will not, it is submitted, survive a close inspection.

In our view, none of the cases cited lays any heavier burden upon a taxpayer before the Board than to disprove the Commissioner's determination. In some cases the Courts have indeed used language on its face indicative of a further duty, but it is submitted that such language results from the fact that the most feasible disproof of one fact is, oftentimes, proof of a contrary fact. That such is the meaning of the language used is exemplified by the extract from the opinion in *Darcy, et al.* v. *Commisioner,* (C. C. A. 2) 66 F. (2d) 581, 585, cert. den. 290 U. S. 705, quoted in the petition as follows:

> "The burden is upon the petitioners to show the correct amount of the tax *in order to show that the commissioner's determination was wrong.* * * *" (Italics supplied).

In all the cases cited in the petition for this point (except *Becker* v. *U. S.*, [C. C. A. 5] 21 F. [2d] 1003),[6] the Board was upheld in redetermining the determination of the Commissioner for lack of proof by the tax-

---

6. In this case the taxpayer had reported its income on the cash basis, which did not correctly reflect income. The Commissioner made an assessment on the accrual basis, which, although not exact, was "as nearly accurate as it was possible to make from the company's books". The taxpayer apparently contented itself with a general contention for the cash basis and the Court approved the assessment. This case presented a special situation; and the same Court subsequently decided *Independent Ice & Cold Storage Co.* v. *Comm., supra,* without reference to it. In any event the *Becker* case did not involve a proceeding before the Board.

payer. But despite the language of the respective Courts relied on in the petition, the fact is that in those cases the taxpayers had not only failed to prove the correct amount of the tax, but had also failed to prove that the Commissioner's determination was wrong.

The cases cited in the petition, then, stand for no more than the proposition, which no one would question, that a taxpayer before the Board has the burden of proving the Commissioner's determination to be wrong. Those cases, it is submitted, are not in conflict with—they are complementary to—the cases hereinabove cited which hold that the Board may not redetermine a determination made by the Commisioner, but established to be wrong. That this construction is correct is amply attested by the fact that, as aforesaid, the Circuit Courts of Appeals of every circuit and the Court of Appeals of the District of Columbia have decided that where the Commissioner's determination has been established to be wrong, the Board may not redetermine it. Indeed in the ninth circuit, *Matern* v. *Commissioner*, (C. C. A. 9) 61 F. (2d) 663, cited in the petition as holding that the taxpayer must show the correct amount of tax, has been cited in a later case by the same Court for the proposition that:

> "This court has held that 'the presumption of correctness is attached to the Commissioner's findings'. *Matern* v. *Comm'r.*, 61 F. (2d) 663, 666. So from the outset the determination by the Commissioner of the fair market value of the property in question was *prima facie* correct and the burden of establishing it as incorrect was upon the petitioner."
>
> *Old Mission Portland Cement Co.* v. *Commissioner*, (C. C. A. 9) 69 F. (2d) 676, 679.

Nor do the cases holding that a taxpayer suing for a refund must prove the correct tax establish a conflict. In those cases the taxpayer is the plaintiff in a suit for a money judgment. He must prove the amount by which his tax has been overpaid, and to do this must, of course, prove the correct amount of the tax.

Even on the question stated in the petition to be presented here, there appears to be no conflict.

Conclusion.

In conclusion it is respectfully submitted that the petition for certiorari should be denied, for:

(a) There is no conflict in respect of the question propounded in the petition;

(b) Whether or not there is such a conflict, this case is so unique that neither that question nor any other question of general importance is raised;

(c) In any event the decision of the Court below is clearly right, for the decision of the Board was wrong and the evidence upon which to base a decision on the merits was, and is, available and in justice ought to be received.

Respectfully submitted,

TRUMAN HENSON,
Attorney for Respondent,
Office and P. O. Address,
26 Liberty St.,
New York, N. Y.

Dated, New York, N. Y., September 6, 1934.

APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9, 110:

Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in Section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (U. S. C. A., Title 26, Sec. 1226.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 815, 818:

Sec. 111. Determination of Amount of Gain or Loss. (a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in Section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recog-

nized for the purposes of this title, shall be determined under the provisions of Section 112.

* * * * *

Sec. 113. BASIS FOR DETERMINING GAIN OR LOSS. (a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(6) *Tax-Free Exchanges Generally.*—If the property was acquired upon an exchange described in Section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. * * *

Treasury Regulations 74:

Art. 58. *Sale of stock and rights.*—* * * Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sale shall have been recovered the total cost.

* * * * *